

ORDER NO. 79638

IN THE MATTER OF THE COMPLAINT OF CLOSECALL AMERICA, INC.,	*	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND
V.	*	
VERIZON MARYLAND INC.	*	CASE NO. 8927

Background.

This matter comes before the Commission on appeal from a Proposed Order of Hearing Examiner. The Hearing Examiner issued his Proposed Order on January 30, 2004. The Proposed Order was appealed by both of the principal parties. CloseCall America, Inc. ("CloseCall") filed a Petition for Reconsideration of the Proposed Order ("CloseCall Memorandum") on March 1, 2004. Verizon Maryland Inc. ("Verizon") filed a Notice of Appeal on March 1, 2004, and a Memorandum on Appeal ("Verizon Memorandum") on March 11, 2004. CloseCall filed a Reply Memorandum ("CloseCall Reply") and a Motion to Strike ("CloseCall Motion to Strike") on March 31, 2004. Verizon filed a Response ("Verizon Reply") to the CloseCall Memorandum on March 31, 2004. Verizon also filed an Opposition to Motion to Strike on March 31, 2004. WorldCom, Inc. ("MCI") filed a Reply Memorandum on Appeal ("MCI Reply") on March 31, 2004. The Commission Staff ("Staff") filed a Motion to Strike Affidavit and Memorandum in Support of the Motion to Strike Affidavit ("Staff Motion to Strike") on March 25, 2004. Staff also filed a Reply Memorandum ("Staff Reply") on March 31, 2004. Verizon filed a "letter" regarding the proceeding with the Commission on August 6, 2004 ("Verizon's August 6th letter"). The Commission issued an Order on August 13, 2004, directing the parties to respond to Verizon's August 6th letter. Responses were

received on September 2, 2004, from CloseCall, MCI, and Staff (“September 2nd Responses”).

In the proceedings before the Hearing Examiner, CloseCall alleged that Verizon links the availability of its voicemail and its digital subscriber line (“DSL”) services to the purchase of Verizon local telephone service, and that customers who choose an alternative local telephone service provider lose their ability to purchase voicemail and DSL service from Verizon. CloseCall argued that this hampers the development of competitive local telephone service and harms customers. Conversely, Verizon denied any anti-competitive impact and asserted that the Commission does not have the authority to compel Verizon to sell its voicemail on a wholesale basis, or to compel Verizon to provide its DSL services to a customer who chooses an alternative voice provider.

Proposed Order.

In his Proposed Order, the Hearing Examiner found that the Commission had jurisdiction to decide both the voicemail and the DSL issues. The Hearing Examiner distinguished between the voicemail and DSL issues based upon the “consumer’s perspective,” finding that an ordinary reasonable consumer would understand that voicemail has no value without local service. In contrast, per the Proposed Order, a consumer understands that DSL service or its functional equivalent can stand alone with or without any telephone service for ordinary voice communications. (Proposed Order at 13-14.)

With this distinction in mind, the Hearing Examiner found that voicemail is not a telecommunications service under federal definitions, but is rather an information service. He further found that the voicemail market is highly competitive, and there is no demonstrated need for corrective action. (Proposed Order at 14.)

With respect to the DSL issue, the Hearing Examiner found that DSL is a telecommunications service over which the Commission has jurisdiction. (Proposed Order at 15.) He also found that Verizon effectively consented to the jurisdiction of this Commission with respect to certain aspects of the provision of DSL service through the commitment it made to comply with Condition Seven of the Commission’s December

16th letter in Verizon's § 271 proceeding, Case No. 8921 ("Condition Seven").¹ (Proposed Order at 17.) Additionally, according to the Proposed Order, the Condition Seven commitment was a commitment by Verizon to find a means of allowing a Verizon DSL customer to retain Verizon DSL service, even if the customer chose another company's voice service.

To effectuate these findings, the Hearing Examiner directed Verizon to enable the seamless retention of Verizon DSL service by not disrupting the existing business relationship between the customer and Verizon Internet Services, Inc. ("VIS").² The Hearing Examiner directed that this be accomplished within thirty days of the date of a final order in this proceeding, at the existing cost of the DSL service. Staff was ordered to oversee the process of maintaining the availability of Verizon DSL service. (Proposed Order at 18.)

Positions of the Parties.

Appeals from the Proposed Order.

CloseCall appealed on the voicemail issue and Verizon appealed on the DSL issue. CloseCall supports the Proposed Order's jurisdictional and DSL findings. Verizon supports the Proposed Order's decision on the voicemail issue, without commenting on the Commission's jurisdiction with respect to that issue.

CloseCall criticizes as arbitrary and capricious the finding in the Proposed Order that voicemail and local telephone service are not tied. CloseCall maintains that the Hearing Examiner fails to recognize substantial record evidence of harm. CloseCall complains that the Hearing Examiner does not punish Verizon for its failure to satisfy the commitment Verizon made in Condition Seven of its § 271 proceeding (Case No. 8921). Finally, CloseCall complains that the Proposed Order does not address Verizon's alleged violation of Section 252 of the Federal Telecommunications Act in failing to file with the Commission certain agreements that CloseCall alleges are interconnection agreements, which should have been available for opt-in. CloseCall requests the imposition of civil penalties under PUC § 13-201.1 of at least \$13,650,000 per agreement. CloseCall further

¹ Verizon made this commitment to comply with Condition Seven in a December 17, 2002, letter filed by Verizon in Case No. 8921.

² VIS is the Verizon affiliate that actually provides Verizon DSL services in Maryland.

requests that the Commission order Verizon to compensate CloseCall and other Competitive Local Exchange Carriers (“CLECs”) that suffered similar discrimination because the agreements were not filed and did not become available for CLEC opt-in. CloseCall asks that the amount of this compensation be equal to 10% of all purchases of Verizon services made between March 1, 2000, and April 1, 2004, and a discount of 10% on all Verizon products and services purchased during the 24-month period beginning on April 1, 2004.

In its appeal, Verizon argues that the Commission lacks jurisdiction to require VIS to provide DSL-based internet access to CLEC voice customers. Verizon maintains that the Hearing Examiner misinterprets the commitment Verizon made in Condition Seven. Finally, Verizon argues that the “extraordinary regulatory obligation” imposed in the Proposed Order is not justified by any competitive concerns. Verizon bolsters its argument by attaching an Affidavit of Rosemarie Clayton (“Clayton Affidavit”) to its Memorandum on Appeal. Essentially, the Clayton Affidavit contains testimony on Verizon’s discussion efforts on the DSL issue.

Reply Memoranda and Motions to Strike.

In its Reply, CloseCall argues that the Commission should deny Verizon’s appeal for failure to raise new arguments and because it relies on new evidence that is not admissible. CloseCall argues that Verizon is wrong about the Commission’s jurisdiction over the DSL issue and argues that Verizon also voluntarily submitted to the Commission’s jurisdiction on the DSL issue via its Condition Seven commitment. CloseCall argues that Verizon has not fulfilled its Condition Seven commitment. CloseCall asserts that Verizon’s market and policy arguments are not relevant and do not excuse Verizon’s failure to live up to its Condition Seven commitment. CloseCall reiterates its position that penalties should be imposed upon Verizon. CloseCall supports its argument for penalties by citing to the Federal Communications Commission’s (“FCC”) recently issued Notice of Apparent Liability against Qwest.

CloseCall’s Motion to Strike objects to the Clayton Affidavit, Attachments A and B to the Clayton Affidavit, and portions of the Verizon Appeal that refer to or rely upon the Clayton Affidavit or its Attachments.

In its Reply, Verizon argues that the Hearing Examiner's conclusions on the voicemail issue are correct and that CloseCall's other arguments are "red herrings." Verizon argues that the Commission does not have jurisdiction to regulate voicemail. Finally, Verizon argues that there is no basis for the assessment of penalties against Verizon. In its Opposition to Motion to Strike, Verizon argues that the information presented in the Clayton Affidavit was not available at the time of the hearings before the Hearing Examiner, and that introduction of the evidence is appropriate. Verizon points out that the new evidence can be subjected to cross-examination if the record is reopened and the new evidence is heard either by the Commission or by a Hearing Examiner on remand for that purpose.

MCI, in its Reply, supports the findings in the Proposed Order on the DSL issue (MCI does not address the voicemail issue). MCI argues that the only reasonable explanation for Verizon's desire to restrict the availability of its DSL service to its local service customers is that Verizon is using its market leverage to retain its dominant position in the local voice service market. MCI accuses Verizon of attempting to obscure the issues in the case, of raising irrelevant facts, and of attempting to mislead the Commission, through the Clayton Affidavit, as to the function of the Change Control forum. MCI questions Verizon's current description of the commitment it made in Condition Seven and Verizon's assertions in this proceeding regarding its inability to bind VIS to Condition Seven. With respect to Verizon's inability to bind VIS, MCI suggests that Verizon either is being disingenuous in this case or was being disingenuous during both the § 271 (Case No. 8921) proceeding and this case.

In its Reply, Staff supports the Proposed Order on the basis that it "is consistent with and supported by evidence in the administrative record and with PSC law," (Staff Reply at 3) and argues that the Commission has jurisdiction to enforce commitments made in other cases. The balance of Staff's Reply focuses on the DSL issue. Staff's interpretation of the jurisdictional question with respect to the DSL issue appears to rest solely upon the Condition Seven commitment. Staff argues that Verizon's Condition Seven commitment would be meaningless unless the Commission also had the right to police compliance with the commitment. Staff argues that "Verizon constructively agreed to a limited jurisdiction by the Commission in regards to investigating its

compliance” with Condition Seven. (Staff Reply at 6-7.) Staff views the Hearing Examiner’s actions as necessary to effectuate the meaning of Condition Seven. Staff argues that the Hearing Examiner’s “rewording... is fully consistent with the PSC law and supported by the administrative record of Case No. 8927.” (Staff Reply at 12.)

In Staff’s Motion to Strike, Staff argues that the introduction of new evidence via attachments to an appeal is contrary to Commission precedent and law, and that Verizon’s attempted introduction of new evidence is contrary to arguments Verizon made successfully in Case No. 8972. (*In the Matter of the Formal Complaint and Petition of CAT Communications International, Inc. v. Verizon Maryland, Inc.*, Ruling of Hearing Examiner dated March 11, 2004.) Staff also argues that allowing the admission of the Clayton Affidavit would violate the due process rights of the other parties to the proceeding.

Verizon’s August 6th Letter and the September 2nd Responses.

Verizon’s August 6th letter describes a wholesale product offering that could be construed, on its face, as a possible mechanism for achieving the DSL result (and the voicemail result) that CloseCall seeks. CloseCall and MCI’s September 2nd Responses discount the relevance and value of Verizon’s offering as a solution to the issues (especially the DSL issue) in this proceeding. Staff’s September 2nd Response sees potential value in the Verizon wholesale product offering and states that Staff has requested a copy of a sample contract so that it can evaluate whether Verizon has properly resolved the DSL service issue. Staff also characterizes Verizon’s August 6th letter as in the nature of a compliance filing that reports on the status of Verizon’s actions to comply with Condition Seven.

Decision.

There are two central substantive issues in this appeal. The first substantive issue is the question of whether Verizon has an obligation to provide voicemail service on a wholesale basis to CLECs. The second substantive issue is the question of whether Verizon may block VIS from offering DSL service to customers who receive local telephone service from a competing telephone company. The starting point for

consideration of both of the two substantive issues is the nature and extent of the Commission's jurisdiction over these issues.

For the reasons discussed below, the Commission finds that it does not have jurisdiction to regulate voicemail and DSL services, but that it does have the authority to evaluate the impact of both Verizon's voicemail and DSL service practices upon telecommunications services over which the Commission does have jurisdiction.

The Hearing Examiner found that the Commission had direct jurisdiction to decide the substantive issues in the case, including both the voicemail and the DSL issues, based upon an inclusive interpretation of language in Public Utility Companies ("PUC") Article § 8-401(d) and in Code of Maryland Regulations ("COMAR") § 20.45.01.02A. PUC § 8-401(d) provides that "[t]elecommunications service' means any service or product provided by a telephone company or reseller that is under the jurisdiction of the Commission." COMAR § 20.45.01.02A provides that "[t]hese regulations apply to every telephone company operating within the State under the jurisdiction of the Public Service Commission." The discussion in the Proposed Order uses this language to conclude that the Commission has jurisdiction over both the voicemail and the DSL issues in this proceeding.

The Hearing Examiner is correct in his analysis of these sections as conferring jurisdiction upon the Commission over services provided by telephone companies, and the Commission agrees that PUC § 8-401(d) provides a broad and inclusive definition of "telecommunications service." However, "telecommunications service" is a term that also has been defined at the federal level. The federal definition has specific exclusions. For example, the FCC has held that voicemail and voice messaging services are "information services," and are not "telecommunications services" under the Telecommunications Act of 1996. *In the Matter of the Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, ¶ 314 (1998). As such, voicemail services are not subject to the resale requirements of § 251(c)(4) and wholesale rate provisions of § 252(d)(3). State commissions do not have jurisdiction to regulate "information services," which include voicemail services. Therefore, this Commission could not, for example, set rates for voicemail services.

The same holds true for DSL service. The Hearing Examiner found that DSL is a telecommunications service and that this Commission can take regulatory action with respect to DSL based upon this finding. The Commission disagrees. Verizon's DSL service is more than the high-speed line over which data is transmitted. It includes the service provider at the end of the line that makes the DSL service a fully functional internet-based service. As such, Verizon's DSL service is not a telecommunications service. It is, like voicemail service, an information service. *See, In the Matter of Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501*, at ¶ 73 (1998). ("We find that Internet access services are appropriately classed as information, rather than telecommunications, services. Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport.") As with voicemail service, the Commission cannot set rates for DSL services or otherwise regulate DSL service.

Furthermore, the Commission notes that the Hearing Examiner's analysis of the "consumer's perspective" must yield to the FCC's distinctions between telecommunications and information services. While interesting and somewhat illuminating on the question of whether Verizon's actions can be said to be anti-competitive or discriminatory, the Commission finds that the consumer's perspective is not the defining perspective on whether a service is a telecommunications service or an information service. The nature of the service, within *the FCC's definitions*, determines whether a service is a telecommunications service or an information service. Under the FCC's definitions, both voicemail and DSL services are information services.

Having found that both voicemail and DSL services are information services rather than telecommunications services, this Commission is precluded from regulating either one. This does not mean, however, that the Commission has no ability to act in order to mitigate discriminatory and anti-competitive impacts upon state-regulated services, like local telephone service, over which the Commission does have jurisdiction. In fact, the Commission has affirmative obligations to enforce the nondiscrimination provisions of its statute and to encourage competition in Maryland's telecommunications market.

Both Verizon and CloseCall are telephone companies within the definition provided in PUC § 1-101(kk),³ and thus are public service companies within PUC § 1-101(w).⁴ As public service companies, both are subject to the Commission's jurisdiction under PUC § 2-112(a). PUC § 2-112(b) provides that the Commission has both the "powers specifically conferred by law" as well as "the implied and incidental powers needed or proper to carry out its functions under [the Public Utility Companies] article." PUC § 2-113 requires the Commission to "supervise and regulate the public service companies subject to the jurisdiction of the Commission to... ensure their operation in the interest of the public... and... promote adequate, economical, and efficient delivery of utility services in the State *without unjust discrimination....*" [Emphasis added.] The Commission is charged with enforcing the prohibitions against discrimination that are contained in PUC § 4-503, which provides:

- (b) *Prohibited.* – For any service rendered or commodity furnished, **a public service company may not directly or indirectly**, by any means, including special rates, rebates, drawbacks, or refunds:
- (1) charge, demand, or receive from a person compensation that is greater or less than from any other person under substantially similar circumstances;
 - (2) extend a privilege or facility to a person, except those privileges and facilities that are extended uniformly to all persons under substantially similar circumstances;
 - (3) **discriminate against a person, locality, or particular class of service**; or
 - (4) **give undue or unreasonable preference to or cause undue or unreasonable prejudice to a person, locality, or particular class of service.** [Emphasis added.]

Additionally, the Commission has obligations under both its own statute (*see, e.g.*, PUC § 4-301(b)(2) and PUC § 8-501), and under the federal Telecommunications Act of 1996, to promote competition in the telecommunications industry.

³ A "telephone company" is defined as "a public service company that: (i) owns telephone lines to receive, transmit, or communicate telephone or teletype communications; or (ii) leases, licenses, or sells telephone or teletype communications." PUC § 1-101(kk).

⁴ A "public service company" is "a common carrier company, electric company, gas company, sewage disposal company, telegraph company, *telephone company*, water company, or any combination of public service companies." PUC § 1-101(w) [emphasis added].

After finding that the Commission has jurisdiction to decide the voicemail issue, the Hearing Examiner concluded that CloseCall failed to demonstrate the need for corrective action by the Commission, and thus ruled against CloseCall on this issue. The Proposed Order found that anti-competitive manipulation of the voicemail market is not possible since no one has market power in the voice mail market. The Proposed Order agreed that voicemail is an information service, not a telecommunications service, under applicable federal law, so that states should not impose common-carrier style regulation upon voicemail service.

The Commission affirms this part of the Proposed Order, not because the Commission has direct jurisdiction to regulate voicemail services, but rather because of the *de minimus* impact of Verizon's voicemail service policies upon local telephone competition. The Commission agrees with the Hearing Examiner and finds that Verizon's voicemail practices do not have an impact upon competition in the local telephone market. Since Verizon's voice mail service practices do not adversely affect competition in the local telephone service market, there is no need or justification for Commission action. With this clarification, the *outcome* of the Proposed Order on the voicemail issue is affirmed.

As stated above, the Commission clarifies that it does not have jurisdiction over the provision of DSL services. As on the voicemail issue, however, the Commission can assess the impact upon local telephone competition of Verizon's intervention to prevent the availability of otherwise available VIS DSL service to a CLEC customer. As a number of jurisdictions have found, preventing a company from blocking the availability of DSL service to a former customer after the customer switches to an alternate local service provider is not a regulation of the DSL service itself. Such a requirement is instead a permissible measure to protect the development of the competitive local telephone service market. In other words, a state commission that imposes such a requirement is regulating the provision of local telephone service, a matter that is within its jurisdiction. *See, e.g., In re: Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, 2002 Fla. PUC LEXIS 401 (June 5, 2002); *BellSouth Telecommunications, Inc. v.*

Cinergy Communications Company, 297 F. Supp.2d 946 (E.D. Ky. 2003); and *Clarification, In re: BellSouth's Provision of ADSL Service*, 2003 La. PUC LEXIS 8, Order No. R-26173-A (April 4, 2003).

This Commission is, fundamentally, in agreement with this analysis. It is noteworthy that Verizon, not VIS, disconnects the customer from Verizon DSL service when the customer switches to a non-Verizon provider of local telephone service, and that, in this proceeding, it is Verizon, not VIS, that speaks for VIS. It is inconceivable that VIS would, independent of the control asserted over it by Verizon, deny its service to its customer merely because the voice provider may change from time to time. This is especially true where, as was averred here, a CLEC is prepared to offer VIS access to the high frequency portion of its leased facility at no cost. Unlike voicemail service, customers do not have the same level of competitive options for DSL service as they do for voicemail service, and may actually have no other option for DSL service. The Commission finds that, in Maryland, Verizon's policy of denying VIS DSL service to a customer who switches to a CLEC voice service has an adverse impact upon the competitive local telephone service market. The Commission also finds that it is a discriminatory practice, and thus contrary to PUC §§ 4-503(b)(3) and (4), for Verizon to deny VIS DSL service to a customer that switches from Verizon's voice service to an alternate voice service provider. Further, it is a violation of PUC § 4-503 for Verizon to offer its VIS DSL service to customers who choose its voice service and to deny its DSL service to customers who choose a competing voice service. This practice chills a customer's right to choose among competing voice service providers and is at odds with the pro-competitive policy of the Telecommunications Act of 1996. Consequently, the Commission requires Verizon to continue to facilitate the provision of VIS DSL service to all customers, regardless of whether the voice service provider is Verizon or a CLEC.

This obligation, discussed above, will exist for those CLECs that also allow Verizon to use the high frequency portion of the loop for the provision of DSL service at no charge to VIS. To the extent that a CLEC would prefer to charge VIS for access to its leased facilities, the Commission views the matter of continued availability of VIS DSL service best left to bilateral negotiations between VIS and the CLEC.

The Commission notes that the FCC currently has before it a request for declaratory ruling that matches the fact pattern in this CloseCall case, and expects that the FCC's ruling will be on point on the DSL question once it is issued. (*Pleading Cycle Established for Comments on BellSouth's Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Such Services to CLEC Voice Customers*, WC Docket No. 03-251, 18 FCC Rcd 26169 (December 16, 2003).) The Commission may reevaluate today's decision once the FCC issues its ruling.

As additional support for its finding that the Commission has jurisdiction over the DSL issue, the Proposed Order also found that Verizon consented to Commission jurisdiction on the issue of the retention of existing Verizon DSL service by customers who switch local service to a competitive local exchange carrier. This finding was based upon, as the Proposed Order terms it, Verizon's "unambiguous commitment to satisfy the Commission concern, as stated in [C]ondition [S]even of its December 1[6], 2002 letter, in Case No. 8921." (Proposed Order at 11.) In view of the Commission's decision on the DSL issue, the Commission does not need to rely upon the Condition Seven commitment in order to decide this case. The Commission notes, however, that Verizon's current argument (that it cannot obligate VIS to continue to provide DSL service) is at odds with the representations that Verizon made during the § 271 (Case No. 8921) proceeding. Throughout the § 271 (Case No. 8921) proceeding, in which Verizon was the litigant and in which Verizon made all of the representations, there was no representation that Verizon and VIS *could not deliver* the continuation of Verizon DSL service when a customer switches out of Verizon local service. Verizon committed to complying with the conditions set out by the Commission in the § 271 (Case No. 8921) proceeding, including Condition Seven. Similarly, in the record in this proceeding, there was no representation that Verizon and VIS, together, *could not deliver* Verizon DSL to a customer.

The Hearing Examiner required Verizon to make it possible, within thirty days, for customers to retain their DSL service, despite switching to a voice provider other than Verizon, with no disruption to service and no change in cost and with oversight by Commission Technical Staff. The Commission modifies this decision as follows:

Verizon must allow all customers to take VIS DSL service on a nondiscriminatory basis regardless of their voice service provider. Given that the Commission is not persuaded that this requirement presents technical obstacles that necessitate a thirty-day waiting period, the Commission eliminates the thirty-day waiting period and declines to require oversight by the Commission's technical staff.

With respect to CloseCall's allegations concerning any agreements that Verizon may not have filed with the Commission, the Commission is not persuaded that the record justifies Commission action at this time. Additionally, in view of the Commission's decision on the substantive issues on the record in this proceeding, the Commission does not reach the issues raised in the Motions to Strike. For the same reasons, the Commission does not address the extra-record information conveyed in Verizon's August 6th letter and the September 2nd responses.

IT IS THEREFORE, for the reasons stated in the body of this opinion, by the Maryland Public Service Commission on this 30th day of November, 2004,

ORDERED:

1. That Closecall's request that Verizon be obligated to provide voicemail service on a wholesale basis to competitive local exchange carriers is denied;
2. That Closecall's request that the Commission find that Verizon has a continuing obligation not to block the availability of VIS DSL service to customers who switch their local exchange service to a competitive local exchange carrier is granted for situations where the CLEC provides access to the high frequency portion of the loop at no charge to VIS; and
3. That the Motions to Strike are denied as moot.

Kenneth D. Schisler

J. Joseph Curran, III

Harold D. Williams

Allen M. Freifeld

Commissioners